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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM PAUL CARY,

Defendant and Appellant.

E052979

(Super.Ct.No. RIF109870)

OPINION

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed as modified.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Marissa
Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Adam Paul Cary pled guilty to assault with intent to commit rape (Pen. Code, § 220),¹ and admitted that he had suffered one prior serious and violent felony conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). In return, defendant was sentenced to a total term of eight years in state prison with credit for time served. Defendant's sole contention on appeal is that he should have been awarded 209 days of additional conduct credit for the time he spent in a state hospital after doctors found him competent to stand trial. The Attorney General agrees. We also agree and will modify the judgment.

PROCEDURAL BACKGROUND²

On April 28, 2003, defendant was arrested and charged with attempted rape (§§ 664, 261, subd. (a)(2), count 1) and assault with intent to commit rape (§ 220, count 2). Defendant thereafter remained in custody for a period of seven years while he was transferred back and forth between county jail and state hospitals due to competency issues.

Defendant was initially found mentally incompetent to stand trial pursuant to section 1368 on January 27, 2004, and ordered to be placed at Patton State Hospital (Patton). Defendant was admitted to Patton on February 4, 2004. On September 1, 2004, Patton recommended that defendant return to court because he was competent to stand trial.

¹ All future statutory references are to the Penal Code unless otherwise stated.

² The details of defendant's criminal conduct are not relevant to the limited legal issue raised in this appeal.

Defendant was returned to county jail to stand trial on October 1, 2004. The preliminary hearing was held on March 25, 2005. Following that hearing, an information was filed charging defendant with assault with intent to commit rape. (§ 220.) The information also alleged that defendant had suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior serious and violent felony strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

On July 27, 2005, defendant was again found mentally incompetent to stand trial. On August 17, 2005, the court again ordered defendant placed at Patton. Defendant was eventually admitted on October 27, 2005, and released to county jail on February 2, 2006. However, on April 13, 2006, the court again ordered defendant to return to Patton for further treatment. Defendant was eventually admitted on December 14, 2006.

On August 20, 2008, Patton sent a letter and a certification of mental competence to the court recommending that defendant be returned to court to stand trial because his mental competency had been restored. Defendant was returned to jail on October 3, 2008.

On November 21, 2008, the court declared a doubt as to defendant's competency and appointed doctors to examine defendant. On July 29, 2009, the court authorized defendant's transportation to and placement at Sylmar Rehabilitation Clinic. Defendant was eventually moved to an inpatient facility in Riverside and then later to Napa State Hospital.

On December 16, 2010, a court-appointed psychiatrist sent a report to the court stating defendant was competent to stand trial. Following a hearing on January 6, 2011,

the court found defendant mentally competent to stand trial pursuant to section 1368.

Defendant was not returned to county jail until January 11, 2011.

On January 11, 2011, pursuant to a plea agreement, defendant pled guilty to committing assault with intent to commit rape (§ 220) and admitted that he had suffered a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). In return, the remaining enhancement allegation was dismissed, and defendant was immediately sentenced to a total term of eight years with credit of eight years for time served. At the time of sentencing, the parties stipulated that defendant had accrued eight years of presentence custody credit, and the court found “eight years credit, leaving a net balance of zero.” The court did not separately calculate defendant’s presentence custody credit.

On October 26, 2011, defendant filed a motion to correct his presentence custody credit, claiming that he was entitled to 2,817 days of actual credit and 208 days of conduct credit. On November 15, 2011, the probation department sent the court a memorandum regarding defendant’s presentence custody credit. The memorandum noted that defendant was entitled to 2,816 days of actual credit for his time spent in county jail (1,296 days) and state hospitals (1,520 days), and 194 days of conduct credit pursuant to section 2933.1.

A hearing on the motion was held on November 30, 2011. Following the hearing, the court awarded defendant a total of 3,020 days of presentence custody credit as follows: 1,296 for actual days served in county jail, plus 1,520 for actual days served in a state mental health facility, plus 204 days of conduct credit under section 2933.1. At the time, the trial court also noted, “And that’s by stipulation of all parties; right?” The

prosecutor responded, “I would be submitting on what probation said with the correction made by Judge Warren with regards to the 4019 time.” Defense counsel did not respond.

DISCUSSION

Defendant contends, and the People concede, that he is entitled to five additional days of conduct credit pursuant to section 2933.1 for the time he spent in state hospitals after doctors found him competent to stand trial but before he was returned to county jail. He further argues that to the extent his counsel stipulated to the award of custody credit, it should not constitute invited error. He also asserts that even if the error was invited, he received ineffective assistance of counsel.³

Individuals detained prior to felony sentencing may earn conduct credit for time spent in penal institutions. (§ 4019.) Although a defendant is not entitled to conduct credit for the time spent receiving treatment in a mental hospital (*People v. Waterman* (1986) 42 Cal.3d 565, 570-571), a defendant is entitled to conduct credit from the date hospital staff determines he is competent to stand trial and he continues to be housed at the facility awaiting return to jail. (*People v. Bryant* (2009) 174 Cal.App.4th 175, 184.) The parties agree that the trial court erred when it failed to award defendant conduct credit for that time.

Initially, the entire time that defendant spent in custody between April 28, 2003, and January 11, 2011, is 2,816 actual days. Defendant spent 1,520 days in state hospitals

³ Because we address defendant’s claim on the merits, we need not determine whether the error was invited or whether counsel was ineffective.

receiving treatment, and he was not entitled to conduct credit for that time.⁴ Hence, he is entitled to a calculation of conduct credit for 1,296 days. The days defendant was attested to be competent but awaiting return to county jail are uncontradicted: 30 days (9/1 – 9/30/04); 44 days (8/20 – 10/2/08); and 27 days (12/16/10 – 1/11/11).

The trial court awarded defendant 1,296 for actual days served in jail, 1,520 days for time served in state hospitals, and 204 days of conduct credit pursuant to section 2933.1. Section 2933.1 limits the amount of conduct credit to 15 percent for violent offenses. In awarding the 204 days of conduct credit pursuant to section 2933.1, the court incorrectly did not include the additional 101 days defendant spent in state hospitals awaiting return to jail. Hence, the additional 101 days defendant spent in state hospitals while competent should have been included in the 1,296 actual days served in jail in calculating the conduct credit. Defendant was therefore entitled to 209 days of total conduct credit (1,397 x 15%), five more days than he was awarded.

The abstract of judgment must be amended to reflect that defendant's actual custody credit is 2,816 days, with conduct credit of 209 days, for a total of 3,025 days.

⁴ The parties do not disagree as to the dates defendant was receiving treatment in state hospitals, so we need not provide a detailed discussion of the dates here.

DISPOSITION

The superior court clerk is directed to prepare an amended abstract of judgment and an amended sentencing minute order reflecting a conduct credit award of 209 days and an actual custody credit award of 2,816 days, for a total of 3,025 days. In all other respects, we affirm the judgment.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

MILLER

J.